Premier Hotel Sdn Bhd v Tang Ling Seng

HIGH COURT (KUCHING) — CIVIL APPEAL NO KG 3–1994(III)
ELIZABETH CHAPMAN JC
29 JULY 1995

Contract *— Exemption clause — Loss of valuables from hotel room — Hotel receptionist parted with room key of guest to unknown person — Whether exemption clause in hotel regulation excluded hotel from liability*

The respondent stayed at a hotel owned by the appellant. He went out one afternoon and left his room key with the hotel receptionist. The receptionist gave the key to an unknown person who said that some of the respondent's workers had come to collect his key. Upon his return, the respondent found that his personal belongings in his room were missing. The respondent did not instruct any one to collect his room key. The respondent sued the appellant for negligence. His evidence was that he had always left his key at the reception and would collect it himself. The appellant's Hotel Regulation contained the following exemption clause: 'The Hotel will not assume responsibility for valuables or money lost from the room.'

The sessions court judge held that the respondent's room key had been handed over to persons unknown and that the loss suffered by the respondent was a result of the negligence of the appellant's employees. The appellant appealed. The appellant relied on the exemption clause as a defence.

Held, dismissing the appeal:

(1) The question for determination by the sessions court judge was essentially one of fact and he had the advantage of seeing and hearing the witnesses. It was only in a rare case that an appellate court would be justified in coming to a different conclusion from the trial judge on the question of credibility.

(2) General words of exclusion would not ordinarily protect a contracting party from liability for negligence. To protect him from liability for negligence, the words used must be sufficiently clear, usually either by referring expressly to negligence or by using some such expression as 'however caused'.

(3) Here, the exemption clause did not clearly or specifically exempt liability for negligence.

(4) The appellant, by its servants, was plainly negligent in failing to look after the respondent's room key and the receptionist had negligently parted with the key.

(5) As for the award of damages, the trial judge had not acted upon any wrong principle of law.

[Bahasa Malaysia summary

Penentang telah menginap di sebuah hotel kepunyaan perayu. Beliau keluar satu tengah hari dan meninggalkan kunci biliknya dengan penyambut tetamu hotel itu. Penyambut tetamu itu telah memberikan kunci itu kepada seorang yang tidak dikenali yang mengatakan bahawa pekerja penentang telah datang untuk mengutip kunci itu. Apabila beliau balik, penentang mendapati bahawa barangan kepunyaannya di dalam bilik itu sudah hilang. Penentang tidak menyuruh sesiapa mengutip kunci bilik itu. Penentang membawa tindakan terhadap perayu untuk kecuaian. Keterangannya adalah beliau selalu meninggalkan kunci biliknya di meja sambut tetamu dan akan mengutipnya sendiri. Peraturan hotel perayu mengandungi fasal pengecualian berikut: 'The Hotel will not assume responsibility for valuables or money lost from the room.'

Hakim mahkamah sesyen memutuskan bahawa kunci bilik penentang telah diserahkan kepada orang yang tidak dikenali dan bahawa kehilangan yang dialami oleh penentang adalah keputusan kecuaian pekerja-pekerja perayu. Perayu membuat rayuan. Perayu bergantung kepada fasal pengecualian itu sebagai pembelaan.

Diputuskan, menolak rayuan itu:

(1) Soalan untuk diputuskan oleh hakim mahkamah sesyen pada dasarnya adalah satu soalan fakta dan beliau mempunyai kelebihan melihat dan mendengar saksi-saksi. Cuma dalam satu kes yang luar biasa mahkamah rayuan boleh disokong dalam membuat kesimpulan yang berlainan daripada hakim perbicaraan atas soalan kebolehpercayaan.

(2) Perkataan-perkataan pengecualian yang am biasanya tidak akan melindung satu pihak yang membuat kontrak dari tanggungan untuk kecuaian. Untuk melindungi dirinya dari tanggungan untuk kecuaian, perkataan-perkataan yang digunakan mestilah cukup jelas, biasanya dengan merujuk secara nyata kepada kecuaian atau dengan menggunakan ungkapan seperti 'however caused'.

(3) Di sini, fasal pengecualian tidak mengecualikan dengan jelas atau spesifik tanggungan untuk kecuaian.

(4) Perayu, melalui pekerja-pekerjanya, jelasnya cuai kerana gagal menjaga kunci bilik penentang dan penyambut tetamu itu telah dengan cuai menyerahkan kunci itu.

(5) Berkenaan dengan award ganti rugi pula, hakim perbicaraan tidak bertindak atas prinsip undang-undang yang salah.]

Notes

For cases on exemption clauses, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1549–1559.

Legislation referred to

Evidence Act 1950 s 114(g)

Fabian Lim (*Fabian AH Lim Advocate*) for the appellant.
Lau Mei Ling (*Sim & Lee Advocates*) for the respondent.

Cur Adv Vult

Elizabeth Chapman JC: This is an appeal against the decision of the learned sessions court judge in holding Premier Hotel Sdn Bhd negligent for the loss of the respondent's valuables and personal effects from the hotel room during the respondent's stay in the said hotel.

The respondent had gone out with his friends one afternoon and on his return to the hotel he went to the receptionist to get his key to the hotel room. He was told by the hotel receptionist that the key to his room had been taken by somebody. He then went up to his room with a friend and he found his room key in the room but his brief case together with his personal effects and his passport, identity card, birth certificate, travellers cheques and Hong Kong dollars amounting to $40,000 were missing.

The respondent then went to the receptionist to ask why his key had been given to somebody else and according to the latter, some of his workers had come to collect his key. The respondent told the receptionist he had no workers in Sibu and further that he did not instruct anyone to collect his room key. It is noted that the respondent was not cross-examined on this by counsel for the appellant.

A police report was lodged; the respondent's trip to Hong Kong had to be cancelled because of the loss of his passport. From the evidence adduced in the court below it is clear that there was no forced entry into the respondent's hotel room; he had placed the key under the care and custody of the appellant's servants.

The respondent's story is that he had always left his key at the reception and would collect it himself. The sessions court judge who had the advantage of seeing and hearing the witnesses found that the respondent's room key had been handed over to person(s) unknown and that the loss suffered by the respondent was a result of the appellant's employees' negligence in handing the room key to person(s) unknown. The sessions court judge did not deem it fit to draw an adverse inference under s 114(g) of the Evidence Act 1950 against the respondent, who did not call his two friends who were with him at the material time, to testify. He was satisfied with the respondent's evidence and he gave no weight to the evidence of DW2, the assistant manager of the hotel.

The question for determination by the sessions court judge was essentially one of fact and I see no valid reason to disturb this finding of fact of the trial judge who had taken proper advantage of his having seen and heard the witnesses and had arrived at such finding based on the material evidence before him. It is only in a rare case that an appellate court lacking the advantage of seeing and hearing the witnesses

would be justified in coming to a different conclusion from the trial judge on the question of credibility.

The crux of the matter here is whether the exemption clause in the Hotel Regulation (exh D1) would operate to exempt the hotel from liability for valuables or money lost from the hotel room. The said clause reads:

> The Hotel will not assume responsibility for valuables or money lost from the room.

9 *Halsbury's Laws of England* para 370 states:

> Necessity for clear words: the contra proferentem rule. The basic rule of construction in respect of exclusion clauses is that it requires clear words to exclude a liability which would otherwise arise. Thus, any ambiguity is to be construed against the party putting forward the clause for his protection; this is known as the contra proferentem rule. This basic rule has been qualified and extended as follows: (1) general words of exclusion will not usually be construed so as to cover serious or 'fundamental' breaches going to the root of the contract; (2) general words of exclusion may be construed as having no application to liability for negligence.

and at para 373:

> Construction against exclusion of liability for negligence. Where a contracting party may be subject to liability for negligence and to a stricter form of liability the position is that general words of exclusion will not ordinarily protect him from liability for negligence, but will prima facie be construed so as to protect him from that stricter form of liability. To protect him from liability for negligence the words must be sufficiently clear, usually either by referring expressly to negligence or by using some such expression as 'however caused'.

In my considered opinion exh D1 did not clearly and specifically exempt liability for negligence. The appellant, by its servants, was plainly negligent in failing to look after the room key of the respondent and the person in charge of the counter at the material time had negligently parted with the key.

As for the award of damages in this case I see no valid reason to interfere with it as I find that the trial judge had not acted upon any wrong principle of law.

For the reasons given above, the appeal is dismissed with costs, unless agreed, to be taxed.

Appeal dismissed.

Reported by Gary Kwan